

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ENVITECH, LLC, a Washington
Limited Liability Company,

Plaintiff,

v.

EVEREST INDEMNITY INSURANCE
COMPANY, a foreign insurer; THE
HARTFORD CASUALTY
INSURANCE COMPANY, a foreign
insurer,

Defendant.

CASE NO. C17-6053RBL

ORDER GRANTING MOTION FOR
PARTIAL SUMMARY JUDGMENT

THIS MATTER is before the Court on Defendant Everest Indemnity Insurance Company's Motion for Partial Summary Judgment on Envitech's Declaratory Judgment, Breach of Contract, and IFCA Claims against it. [Dkt. #19].

This case involves an insurance coverage dispute between Envitech and Everest. Envitech is an environmental engineering consulting firm. Envitech purchased a liability insurance policy¹ from Everest, which was in effect between April 9, 2013, and April 9, 2014.

¹ Each of the Everest policies includes three coverages: Professional Liability, CGL, and Contractor Pollution Liability. The policies did not change year to year.

1 Envitech renewed the policy each of the next four years: the 2014 Policy, the 2015 Policy, the
2 2016 Policy, and the 2017 Policy. The 2017 Policy expired on April 9, 2018.

3 In 2017, a third-party claimant, K&S Motels, LLC, sued Plaintiff Envitech, claiming it
4 had negligently performed an environmental site assessment some ten years earlier. Envitech
5 tendered its defense in the underlying state court action to its insurer, Everest. Everest agreed to
6 defend Envitech, subject to a full reservation of rights under the liability policies. Envitech sued
7 Everest in this Court, asserting two contractual claims—declaratory relief and breach of
8 contract—and three extra-contractual claims: common law bad faith; the Washington Consumer
9 Protection Act and the Insurance Fair Conduct Act.

10 In the underlying lawsuit, K&S claims that it sought to purchase real property in Tacoma,
11 and its lender, Unibank, required an environmental site assessment. Unibank hired Envitech to
12 perform a Phase I Environmental Site Assessment. Envitech completed its work and summarized
13 its findings in Assessment dated August 29, 2007. Envitech concluded that the Property did not
14 suffer from hazardous environmental conditions, and opined that no further investigation was
15 required. K&S claims it purchased the Property for \$1.185 million, based upon the professional
16 opinions expressed in Envitech’s Assessment.

17 Nine years later, K&S received an offer to purchase the Property for \$1.2 million. K&S
18 claims the prospective purchaser performed its own site assessment, during which it discovered
19 petroleum products in the soil and groundwater that exceeded applicable cleanup standards. K&S
20 claims the prospective purchaser terminated its offer because of the contamination.

21 K&S sued Envitech for negligent misrepresentation and professional negligence. K&S
22 alleges that Envitech’s Assessment failed to comply with applicable industry standards, and that
23
24

1 the Assessment contained materially false representations, which Envitech failed to correct
2 before K&S attempted to sell the Property in 2016.

3 In *this* case, Envitech asserts two contractual claims against Everest—declaratory relief
4 and for breach of contract—and three-extra-contractual claims for allegedly mishandling
5 Envitech’s insurance claim: bad faith, CPA and IFCA. Everest asserted a Declaratory Judgment
6 counterclaim, seeking a determination that it had duty to defend or indemnify Envitech in the
7 underlying action.

8 Washington courts apply a two-step process to determine whether a liability policy
9 provides coverage. First, the insured must prove that the loss falls within the policy’s insuring
10 agreement. And, if so, then the burden shifts to the insurer to prove that a policy exclusion
11 applies. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 431, 38 P.3d 322 (2002). For the
12 reasons discussed below, the claims asserted by K&S against Envitech do not fall within the
13 Everest Policies’ insuring agreements and are also excluded from coverage.

14 **1. The Everest Policies do not provide Professional Liability coverage for K&S’s**
15 **claims against Envitech.**

16 The Everest Policies each contain a Professional Liability coverage part, which contains
17 the following insuring agreement:

- 18 a. We will pay those sums that the insured becomes legally
19 obligated to pay as compensatory damages because of any
20 “claim” that results from a “professional services incident”
21 to which this insurance applies. We will have the right and
22 duty to defend the insured against any “suit” seeking those
23 damages. However, we will have no duty to defend the
24 insured against any “suit” seeking damages because of any
“claim” that results from a “professional services incident”
to which this insurance does not apply. . . .

* * *

- b. This insurance applies to a “claim” that results from a

1 “professional services incident” only if:

2 * * *

3 (3) a “claim” for damages because of the “professional
4 services incident” is first made against any insured, in
5 accordance with Paragraph c. below, during the
6 policy period or any Extended Reporting Period we
7 provide under Section V – Extended Reporting
8 Periods.

9 c. A “claim” by a person or organization seeking damages
10 will be deemed to have been made at the earlier of the
11 following times:

12 (1) When the notice of such “claim” is received and
13 recorded by any insured or by us; or

14 (2) When we make a settlement in accordance with
15 Paragraph 1.a. above.

16 All “claims” for damages that result from a “professional
17 services incident” and in injury to the same person or
18 organization, including damages claimed for care, loss of
19 services or death resulting at any time from the injury, will
20 be deemed to have been made at the time the first of those
21 “claims” is made against any insured.

22 Thus, the Policies provide Professional Liability coverage on a “claims-made” basis.

23 That is, whether each policy provides coverage depends upon when a claim is first made against
24 the insured—not when the claimant’s alleged loss or injury occurred.

Here, K&S sent its first demand letter to Envitech on March 8, 2017. The claim was first
made against Envitech during the 2016 Policy period. At that time, the 2013, 2014, and 2015
Policies had already expired and the 2017 Policy had not yet incepted. The 2013, 2014, 2015,
and 2017 Policies, therefore, do not provide Professional Liability coverage.

The 2016 Policy also does not provide Professional Liability coverage for K&S’s claims
against Envitech. The 2016 Policy does not provide Professional Liability coverage for a
“professional services incident” that occurs before the Policy’s “Retroactive Date”:

b. This insurance applies to a “claim” that results from a “professional services incident” only if:

* * *

(2) The “professional services incident” did not occur before the Retroactive Date identified in the Declarations, or after the end of the policy period[.]

The Retroactive Date for all five Everest Policies is April 8, 2008. The Everest Policies—including the 2016 Policy—therefore do not provide Professional Liability coverage for a professional services incident that occurred before April 8, 2008.

K&S alleges that Envitech negligently performed the Assessment (and failed to correct material misrepresentations in i). Envitech completed the Assessment no later than August 29, 2007—approximately eight months before the Retroactive Date. Because K&S’s claims are the result of a professional services incident that took place before the Retroactive Date, the Everest Policies do not provide coverage by their terms, as a matter of law.

Furthermore, the Everest Policies expressly *exclude* coverage for K&S’s claims against Envitech. The Professional Liability coverage part contains a “Prior Professional Services” exclusion. This exclusion bars coverage for any claim based upon a consequence of, or arising out of, any professional services performed by an insured prior to the Retroactive Date:

2. Exclusions

This insurance does not apply to any “claim”:

* * *

s. Prior Professional Services

Based upon, as a consequence of or arising out of any “professional services” performed by or on behalf of an insured prior to the Retroactive Date identified in the Declarations.

1 Because K&S's claims against Envitech are based upon an Assessment done eight months before
2 the Retroactive Date, the Everest Policies exclude coverage, again by its terms and as a matter
3 law.

4 **2. The Everest Policies do not provide CGL coverage for K&S's claims against**
5 **Envitech.**

6 Each of the Everest Policies also contains a CGL coverage part. Under the applicable
7 CGL insuring agreement, the Policies provide liability coverage for "property damage" caused
8 by an "occurrence:"

- 9 a. We will pay those sums that the insured becomes
10 legally obligated to pay as damages because of
11 "bodily injury" or "property damage" to which this
12 insurance applies. We will have the right and duty
13 to defend the insured against any "suit" seeking
14 those damages. However, we will have no duty to
15 defend the insured against any "suit" seeking
16 damages for "bodily injury" or "property damage"
17 to which this insurance does not apply
- 18 b. This insurance applies to "bodily injury" and
19 "property damage" only if:
- 20 (1) The "bodily injury" or "property damage" is
21 caused by an "occurrence" that takes place
22 in the "coverage territory";
- 23 (2) The "bodily injury" or "property damage"
24 occurs during the policy period. . . .

19 If the alleged occurrence does not cause the property damage at issue, then the Policies
20 do not provide liability coverage. Mere economic losses (e.g., diminished value of land,
21 decreased resale price, etc.) do not constitute property damage. *See, e.g., Goodstein v. Cont'l*
22 *Cas. Co.*, 509 F.3d 1042, 1054 (9th Cir. 2007) (applying Washington law); *Big Constr., Inc. v.*
23 *Gemini Ins. Co.*, 2012 WL 1858723, at *8 (W.D. Wash. May 22, 2012); *Chicago Ins. Co. v. Ctr.*
24 *for Counseling & Health Res.*, 2011 WL 1221019, at *4 (W.D. Wash. 2011).

1 K&S's claims against Envitech do not fall within this CGL coverage. K&S does not
2 allege that Envitech caused the contamination conditions at the Property. Rather, it claims only
3 that Envitech failed to identify and disclose environmental contamination in the Assessment, and
4 failed to subsequently correct its professional errors. In other words, K&S alleges that it suffered
5 monetary losses by purchasing the contaminated Property and by being unable to sell it without
6 incurring remediation costs. These alleged economic losses do not constitute "property damage"
7 under the Policies, as a matter of law.

8 Furthermore, the Everest Policies, expressly exclude CGL coverage for K&S's claims
9 against Envitech. For example, each of the Policies contains an absolute pollution exclusion;
10 they do not cover losses resulting from pollution, even if they are otherwise the result of an
11 "occurrence".

12 The CGL coverage part also expressly excludes coverage for Envitech's professional
13 negligence:

14 This insurance does not apply to "bodily injury", "property
15 damage" or "personal and advertising injury" arising out of
16 the *rendering of or failure to render professional services*
17 by you. . . including the preparation or approval of maps,
shop drawings, opinions, reports, surveys, field orders,
change orders, or drawings, specifications or engineering
services. (emphasis added).

18 That is, an insured's liability for property damage arising out of the rendering or failure to render
19 professional services is not covered.

20 Finally, and in any event, an endorsement to the CGL coverage part also expressly
21 excludes liability coverage for "testing and consulting errors and omissions":

22 This insurance policy does not apply to "bodily injury", "property
23 damage" or "personal and advertising injury" arising out of:

- 24 1. An error, omissions, defect or deficiency in:

- a. Any test performed; or
 - b. An evaluation, a consultation or advice given, by or on behalf of any insured;
2. The reporting of or reliance upon any such test, evaluation, consultation or advice; or
 3. An error, omission, defect or deficiency in experimental data or the insured's interpretation of that data.

Because K&S alleges that Envitech provided a deficient evaluation in the Assessment, this exclusion also applies and bars coverage for K&S's claims against Envitech, as a matter of law.

3. The Everest Policies do not provide CPL coverage for the claims asserted against Envitech.

The Everest Policies also contain a CPL coverage part, which provides two types of CPL coverage: (1) occurrence-based coverage; and (2) claims-made coverage. Neither provides coverage for the underlying claims.

Under both CPL insuring agreements, the alleged property damage must result from a pollution condition that arises *out of* the insured's work:

- b. This insurance applies to "bodily injury" and "property damage" only if:

* * *

- (3) The "bodily injury" or "property damage" results from a "pollution condition" that arises out of "your work".

Here again, K&S's claims against Envitech do not satisfy the occurrence-based nor the claims-made insuring agreements. K&S does not allege that the contaminated conditions at the Property *arose out of* Envitech's work; it alleges only that Envitech negligently failed to identify

1 conditions that existed long before Envitech performed its Assessment. The Policies, therefore,
2 do not provide CPL coverage for K&S's claims as a matter of law.

3 Furthermore, the CPL coverage expressly excludes coverage for prior pollution
4 conditions, which commenced before the policy period.

5 Finally, the CPL coverage part also excludes coverage for an insured's professional
6 liability:

7 2. **Exclusions**

8 This insurance does not apply to:

9 * * *

10 g. **Professional services**

11 "Bodily injury" or "property damage"
12 arising out of the *rendering of or failure to*
13 *render professional services* by you or any
14 contractor or subcontractor working on your
15 behalf, including the preparation or approval
 of maps, shop drawings, opinions, reports,
 surveys, field orders, change orders, or
 drawings, specifications or engineering
 services.

16 Because K&S alleges that Envitech breached its professional duties by failing to identify the
17 contamination conditions or correct its errors, the Policies do not provide CPL coverage as a
18 matter of law.

19 **3. Envitech's evidentiary objections lack merit.**

20 Envitech argues that Everest failed to meet its evidentiary burden as the moving party
21 under Fed. R. Civ. P. Rule 56. Envitech argues the Court should not consider the relevant
22 documents—e.g., the Policies, the Underlying Complaint, and the Assessment—which are
23 attached as exhibits to the declaration submitted by Everest's counsel. Envitech contends that
24

1 Everest's counsel lacks personal knowledge sufficient to authenticate the documents under Rule
2 901 of the Federal Rules of Evidence.

3 But "Rule 56(c) only requires that a fact be presented in a form that 'would be
4 admissible' in evidence not necessarily in a form that is admissible now." *Sullivan v. City of*
5 *Marysville*, 2014 WL 467896, at *4 (W.D. Wash. Feb. 5, 2014) (quoting Fed R. Civ. P. 56(c)).

6 And this exception to the authentication requirement "is particularly warranted in cases . . .
7 where the objecting party does not contest the authenticity of the evidence submitted but
8 nevertheless makes an evidentiary objection based on purely procedural grounds. Here, in its
9 opposition brief, Envitech concedes that documents are authentic and objects on purely
10 procedural grounds. Because Envitech admits to the authenticity of the document submitted by
11 Everest's counsel, its procedural argument fails.

12 Envitech also argues that the Assessment and the Underlying Complaint are "pure
13 hearsay" and, thus, inadmissible under Rule 802. But Everest did not submit the Underlying
14 Complaint to prove that the underlying allegations are true. Rather, Everest submitted the
15 Underlying Complaint to show that K&S's claims against Envitech is not covered under the
16 Policies. Everest's coverage arguments depend solely on Envitech's potential liability to K&S—
17 not its actual liability (if any). Whether or not the allegations in the Underlying Complaint are
18 true, the Policies still bar coverage. The Underlying Complaint is not offered for the truth of the
19 matter asserted and, therefore, it is not hearsay.

20 Nor is the Assessment hearsay. It is a report authored by Envitech's president (which
21 Envitech concedes is authentic). And, thus, it is an admission of a party opponent, which is
22 exempted from the definition of hearsay under Rule 801(d)(2). The Assessment it authored is not
23 inadmissible hearsay.

Everest does not seek summary judgment on Envitech’s extra-contractual bad faith and CPA claims. But it does seek summary judgment on Envitech’s legally-deficient IFCA claim. Envitech is not a “first party claimant” under IFCA and, therefore, it cannot maintain an IFCA claim. Furthermore, because the Policies do not provide coverage for the underlying claims, Everest did not unreasonably deny coverage. Absent an unreasonable denial, Envitech cannot maintain an IFCA claim based on procedural claim-handling violations.

Based on the facts and the terms and conditions of the Policies, the Court **GRANTS** the Defendant Everest Indemnity Insurance Company's Motion for Partial Summary Judgment [Dkt. #19] and declares that the Policies do not provide defense or indemnity coverage for K&S's claims against Envitech, and that Everest has no continuing obligation to defend Envitech in the underlying lawsuit. Envitech's IFCA claim is **DISMISSED** as a matter of law.

IT IS SO ORDERED.

Ronald B. Lightner

Ronald B. Leighton
United States District Judge